

DEC 15 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

ARTURO GONZALEZ,

Plaintiff - Appellant,

v.

CITY OF SANTA MONICA,

Defendant,

and,

BICKLER, Police Officer, Santa Monica
Police Department; CARRANZA, Police
Officer; LUCIO, Police Officer; LEGURSKI,
Police Officer,

Defendants - Appellees.

No. 02-56553

D.C. No. CV-99-05409-R

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 2, 2003
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: PREGERSON, COWEN,** and W. FLETCHER, Circuit Judges.

Petitioner Arturo Gonzalez appeals the grant of summary judgment and dismissal of his § 1983 action for use of excessive force, for arrest without probable cause, and for malicious prosecution. Because the complaint and supporting evidence, when construed in the light most favorable to the plaintiff, properly allege a constitutional violation, we reverse the decision of the district court.

When reviewing a defendant's motion for summary judgment, we take the facts in the light most favorable to the non-moving party. *See Haugen v. Brosseau*, 339 F.3d 857, 826 (9th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *see also* Fed. R. Civ. P. 56. Where there are disputes as to material issues of fact, summary judgment is not appropriate. *Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003). In this case, the district court incorrectly resolved virtually all material disputes in favor of the officers. *See Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

The use of force is excessive and therefore violative of the Fourth Amendment when, balancing “the nature and quality of the intrusion on the

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

individual's Fourth Amendment interests" with "the countervailing governmental interests at stake," the finder of fact determines the force used was unreasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Because of the need for such balancing, "summary judgment . . . in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

In his affidavit, Gonzalez states, among other things, that although he was shouting at the officers to put their guns away, he at no time touched an officer or otherwise interfered with the arrest of his brother. He further states in his affidavit that Officer Legerski sprayed him in the face with pepper spray, and that Officer Carranza beat him on the leg and knee with his baton while Officer Bickler pulled his hair and Officer Lucio pulled him by his arm. A reasonable jury could conclude that the officers used excessive force in this case, thus violating the Fourth Amendment. *See Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199 (9th Cir. 2000). Since the law governing excessive force was clearly established at the time of the alleged incident, qualified immunity would be inappropriate under the facts alleged. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003). The district court thus erred in granting summary judgment with respect to this claim.

In order for an arrest to constitute a valid seizure under the Fourth Amendment, an officer must have probable cause that an individual committed a crime to constitute a lawful seizure. *Beck v. Ohio*, 379 U.S. 89 (1964). In his complaint and supporting affidavit, Gonzalez states that he did not interfere with the police officers while they were attempting to arrest his brother. Assuming, as we must, that this is true, the police would not have probable cause to arrest Gonzalez for lynching or battery of an officer, the crimes for which he was arrested. As the requirement that police possess probable cause to arrest an individual was established by *Beck* in 1964, qualified immunity, and hence summary judgment, would not be appropriate.

The district court did not err in granting summary judgment with respect to the malicious prosecution claim, however. In order to state a cause of action for malicious prosecution under § 1983, the plaintiff must allege that the conduct was “conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights.” *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). Since Gonzalez makes no such allegation, the district court properly dismissed this claim.

The decision of the district court with respect to the malicious prosecution claim is **AFFIRMED**. The district court’s dismissal of Gonzalez’s § 1983 actions

for the use of excessive force and unlawful arrest is **REVERSED**, and we
REMAND for proceedings on the merits.